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No. 85-502

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

QUINCY CABLE TV, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. In this case, the court of appeals held unconstitutional the Federal Communications Commission's current "must-carry" rules, which in general terms require a cable television system to retransmit the broadcast signals of all television stations that serve the area served by the cable system.[1]

a. In 1980, respondent Turner Broadcasting System, Inc., a company that, among other things, provides program services to cable system operators (Pet. App. 7a n.3), filed a petition with the FCC requesting the initiation of a rulemaking proceeding to repeal the must-carry rules. Turner Broadcasting argued that the rules were not

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[1]Pet. App. 11a-13a & n.12. These rules are codified at 47 C.F.R. 76.57, 76.59, 76.61.

necessary to guarantee cable subscribers access to broadcast signals, asserted that the rules violated the First Amendment by requiring cable system operators to carry particular programming, and claimed that the rules subjected providers of non-broadcast program services to a competitive disadvantage. *Id.* at 23a-24a, 69a.

The Commission denied the petition (Pet. App. 69a-73a). It first stated that the must-carry rules did not violate the First Amendment (*id.* at 70a). It found that "[f]rom a policy perspective" there were "countervailing arguments both for keeping and for dispensing with the[] rules" (*ibid.*). The Commission stated that the rules "were adopted because the Commission believed they were necessary to maintain the availability of local broadcast service to both those who were cable subscribers and those who were not" (*id.* at 71a). It noted that the Copyright Act of 1976 established a compulsory licensing scheme enabling cable systems to retransmit broadcast signals without the permission of the copyright owner. It also stated that a substitute for the must-carry rules might not satisfactorily "protect[] [the] access of off-air stations to cable subscribers and thus their viability and accessability to nonsubscribers" (*ibid.*).

The Commission also found several factors weighing in favor of administrative review of the rules. It noted that the must-carry rules favored broadcasters over other suppliers of programming to cable systems and deprived cable subscribers of the ability to select program material (Pet. App. 72a). The Commission concluded that "a more complete factual base is needed before a proceeding of the type requested is commenced" (*id.* at 73a (footnote omitted)).

b. Respondent Quincy Cable TV, Inc., the operator of a cable system in Quincy, Washington, petitioned the FCC for a waiver of the must-carry rules so that it could delete three broadcast signals from its cable service. It argued that

the signals could be received over the air without cable and that the cable channels were needed to carry alternative programming. Pet. App. 26a-27a, 88a-89a. The petition was denied by the chief of the Commission's Cable Television Bureau and the chief's decision was affirmed by the Commission. *Id.* at 88a-104a; see also *id.* at 105a-123a (denying requests for reconsideration). The Commission rejected Quincy's arguments that the must-carry rules violated Quincy's First Amendment rights.

2. The court of appeals consolidated the petitions for review filed by Turner Broadcasting and Quincy Cable and held the Commission's current must-carry rules invalid under the First Amendment (Pet. App. 2a-60a). The court first concluded that First Amendment principles relating to government regulation of the broadcast media do not govern the constitutionality of regulations applicable to cable systems (*id.* at 29a-34a). Applying the standard for measuring the constitutionality of "incidental" burdens on speech established by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court of appeals held that "the must-carry regulations, as written, are clearly impermissible" (Pet. App. 41a). It found that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat" (*id.* at 51a). The court also found the rules unconstitutional "as currently drafted" because they are a " 'fatally overbroad response' to the perceived fear that cable will displace free, local television" (*id.* at 53a (citation omitted)).

The court emphasized that it was "hold[ing] only that in their current form [the must-carry rules] can no longer stand" (Pet. App. 60a). It stated that "[s]hould

the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so. We would consider the constitutionality of the product of that effort at the appropriate time" (*ibid.*).

3. Review of the decision below is not warranted because the Commission no longer wishes to maintain the must-carry rules invalidated by the court of appeals. Since the court of appeals expressly limited its holding to the present rules, and the Commission currently is considering various regulatory alternatives, this Court need not address the constitutional questions raised by petitioners at this time. If the Commission promulgates new regulations, and the court of appeals holds those regulations unconstitutional, this Court will have the opportunity to consider the relevant issues in that context.

The court of appeals repeatedly emphasized that its holding applied only to the current must-carry rules, invited the Commission to "recraft the rules," and stated that it "would consider the constitutionality of the product of that effort at the appropriate time" (Pet. App. 60a). After the court of appeals rendered its opinion, a majority of the Commission stated that the rules invalidated by the court of appeals were inappropriate "in the mass media marketplace of today" (*id.* at 138a).

Several parties, including a number of the petitioners before this Court, have filed rulemaking petitions requesting that the Commission issue a notice of proposed rulemaking to adopt new rules in place of the must-carry rules invalidated by the court of appeals. The Commission recently issued a "Notice of Inquiry and Notice of Proposed Rule Making" soliciting public comments regarding the

issues raised in the rulemaking petitions. See *In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems,* MM Docket No. 85-349 (Nov. 14, 1985).[2] The chairman of the FCC has indicated that rulemaking petitions relating to this issue will be "carefully consider[ed]." App., *infra,* 2a.[3]

In view of these developments, it is both unnecessary and inappropriate for this Court to review the decision of the court of appeals in this case. If the Commission issues new must-carry rules, the constitutionality of those rules will be addressed by the court of appeals in the first instance. This Court then would have an opportunity to consider the issues raised by petitioners in the context of rules that the FCC considers necessary to further the public interest. There is no warrant for this Court to address sensitive constitutional issues when the Commission has disclaimed

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[2]We have lodged with the Clerk of this Court copies of the Notice of Inquiry and Notice of Proposed Rule Making and copies of the rulemaking petitions.

[3]At the time the Commission majority issued its statement regarding the current must-carry rules, it indicated that it could not "conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision" (Pet. App. 138a). The chairman subsequently explained that this statement was not intended "to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules" (App., *infra,* 2a). Thus, the Commission intends to give full and appropriate consideration to the proposals advanced in the petitions for rulemaking.

any interest in maintaining the rules invalidated by the court of appeals.[4]

Respectfully submitted.

CHARLES FRIED
Solicitor General

JACK D. SMITH
General Counsel
Federal Communications Commission

NOVEMBER 1985

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[4]There is accordingly no reason for the Court to hold this case pending its disposition of *Los Angeles* v. *Preferred Communications, Inc.*, cert. granted, No. 85-390 (Nov. 12, 1985). The issue in *Preferred Communications*—whether the First Amendment requires a municipality to permit the use of its facilities by all persons interested in providing cable television service—differs substantially from the question presented here. To the extent this Court's decision in *Preferred Communications* sets forth general principles relating to the application of the First Amendment to regulations governing cable system programming, the Commission will, of course, fully take account of those principles in considering the pending rulemaking petitions.

DOJ-1985-11

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Sept. 24, 1985

Senator Barry Goldwater
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your September 13, 1985 letter concerning must carry. I appreciate your support for the Court's decision in *Quincy* and our decision not to appeal that case. You are right that we are faced with a continuing deluge of questions on this matter, particularly from new independent stations now in the process of starting operations.

As Commissioners Dawson, Patrick, and I stated at the time we released the public notice of our decision to not appeal the *Quincy* case, the *Quincy* decision's constitutional analysis as to cable represents a positive step toward recognizing First Amendment protection for all forms of electronic media. We applauded that. However, we felt that the Court, by removing the cable must carry obligation without changing the special treatment cable receives under the copyright law, had created an unbalanced situation which deserved a solution. We suggested that a true mass media marketplace would not be achieved until cable's copyright immunity was replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties.

After carefully considering the possibility of resurrecting the must carry rules, we noted that we could not conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test

outlined in Quincy. We felt the better course was an equitable realigning of free marketplace forces (through changes in the copyright immunity afforded cable) rather than another false equilibrium balancing the present copyright immunity with new carriage rules which would displace cable consumer choices and interfere with the marketplace.

Nonetheless, we never intended our statement to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules. So far, no one has come forward.

I assure you that we will carefully consider any such petition we may receive. My sense is that such a petition would benefit from public comment, and the Commission would seek such comment with a combined Notice of Inquiry/Notice of Proposed Rule Making. Any inquiry would include an examination of the communications policy implications of cable's compulsory license in light of the *Quincy* case.

Again, thank you for your concern about this issue.

Sincerely,

Mark S. Fowler
Chairman